In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 47 47

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (C.I.O.),
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L.

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JURISDICTION.

The jurisdiction of this Court is invoked by petitioner upon Section 240(a), Judicial Code, as amended, 28 USCA 1254 (1), and Section 10 (e) and (f) of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947.

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act of 1935, 29 USCA 151 et seq., especially 29 USCA 157, 158 (1) and (3).

AMPLIFICATION OF PETITIONER'S STATEMENT OF THE CASE.

Petitioner here seeks a review of the application of Section 8(3) of the National Labor Relations Act of 1935 to the factual setting disclosed in the instant proceedings. The Board, by application of the doctrine first particularly enunciated in *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, charged the petitioner with unfair labor practices resulting from his discharge of employees pursuant to a closed shop contract when he had knowledge that the incumbent union's requests for discharge were based upon the employees' advocacy of a rival union during a period when it was appropriate for employees to seek a change of bargaining representatives.

Reiterating the facts disclosed by the Record in the instant proceeding, set forth in this intervenor's brief in

opposition to the petition for a writ of certiorari, it is manifest that each of the elements requisite to the application of the *Rutland Court Doctrine* has been abundantly, if not overwhelmingly, established by the evidence in the instant proceeding. The portions of the Record hereinbelow set forth are, in varying degrees, omitted or glossed over in petitioner's statement of the case. A partial chronology of the events in petitioner's plant will serve the purpose of establishing the knowledge of the employer of the union's purpose in requesting the discharge:

Early 1945: Dissatisfaction with the C.I.O. is developing in the plant. (R.I, 25; R.I, 225-226).

July 20, 1945: Employer's Vice President, B. W. Railey, requests presence of the five plant stewards when the contract was to be extended, because of impending labor troubles and employee unrest (R.I, 188-189, 225-226).

July 28, 1945: Five plant stewards, pursuant to decisions formulated at an earlier meeting, seeking a change of bargaining representative, post on the bulletin boards throughout the plant, a notice of meeting inviting all interested in joining "Employees Welfare Association" to be present at a certain meeting hall on July 30, 1945 (R.I, 69, 27; R.I, 191-192, 255-256).

Superintendent informs Labor Relations Director of the Notice (R.III, 667-668, R.I, 255-256).

July 28 or 29, 1945: One steward and an employee obtain permission from the Superintendent for a plant shut-

down of two hours in order that employees may attend the meeting (R.I, 69-70; R.I, 268-269).

July 30, 1945: On the day of the scheduled meeting, C.I.O. agents request discharge of the five stewards leading the anti-C.I.O. organizational drive on the ground that they have been "suspended from membership" in the C.I.O. "pending a trial" (R.I, 27-28; R.III, 668-669, 784-785, R.I, 259, 256).

After a conference between the Superintendent and Vice President (R.II, 522, R.III, 669-670), the Vice President discharges the five stewards (R.I, 70, 29; R.I, 194, 256-257, 288-289).

C.I.O. agents distribute throughout the plant bulletin stating:

ATTENTION

All Warehouse Union Members: An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING

Any member of Local 6 who attends such illegal meeting or participates in violation of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union
Local No. 6, I.L.W.U.

(R.I, 70, 31-32; R.I, 256; R.III, 785; R.I, 259).

According to the Vice President the plant was "in a state of turmoil due to the fact of a lot of conversation and visiting, and union people going through the plants, and people couldn't get their work done" (R.I, 36; R.II, 528).

More than 200 of the 313 employees within the bargaining unit attend the scheduled anti-C.I.O. meeting (R.I, 70, 32; R.I, 196, 256). Employees attending unanimously decide to form an independent union, the "Employees Welfare Association", as an intermediate step until affiliation with an international union can be effected (R.I, 70, 32; R.I, 196, 200-201, 261, 288; R.III, 848; R.I, 259). Four employees are designated committeemen and directed to demand reinstatement of the discharged stewards and, if they should be unable to obtain reinstatement, all employees would cease work in protest (R.I, 70, 33; R.I, 196, 199; R.III, 849; R.I, 259).

Telegrams are sent to the C.I.O. and employer's Vice President by the "Negotiating Committee" of the "Employees Welfare Association" notifying them of the fact that more than 200 employees have severed relations with ILWU-6 as collective bargaining agent (R.I, 70-71, 34; R.I, 257; R.III, 786-787; R.I, 259).

July 31, 1945: The four committeemen request reinstatement of the discharged stewards (R.I, 71; R.I, 257, R.II, 360-361).

C.I.O. agents, committeemen, the Company's Vice President and Superintendent gather in the office of the Vice President (R.I, 35; R.II, 361, 527).

Vice President admits "it became quite apparent as this conversation took place that there was a schism developing in the ranks of the C.I.O." (R.II, 545-546).

During this meeting, C.I.O. agents notify committeemen that suspension notices are being prepared for them (R.I, 71; R.I, 263-264).

Employer receives formal request for discharge of the four committeemen (R.I, 71, 36-37; R.III, 673-675, 846-847).

C.I.O. agents circulate another bulletin in the plant stating that those associating and advocating the cause of the four committeemen would jeopardize "their • • • reputation • • • union standing • • • seniority, and their jobs" (R.I, 71, 37-38; R.III, 789; R.I, 257, 259).

A second anti-C.I.O. meeting is held at noon and attended by a majority of the employees (R.I, 71, 38; R.I, 257). The Vice President of the Petitioner attended the meeting and stated that reinstatement of stewards was impossible (R.I, 72, 38-39; R.I, 257-258; R.II, 529-531).

Employees vote in protest not to return to work and two and one-half day strike of a majority of the employees commences (R.I, 72, 38-39; R.I, 202, 258, 266; R.III, 677, 850-851; R.II, 533).

August 2, 1945: Majority of employees attend third anti-C.I.O. meeting and it is decided to affiliate with the International Chemical Workers' Union, A.F.L., to return to work, and to request an election be conducted

by the National Labor Relations Board (R.I, 72, 40; R.I, 258, R.III, 851-852, R.I, 259).

August 2, 1945: Petitioner's Superintendent notifies the four committeemen that, in view of their suspension by the C.I.O., it would be futile for them to return (R.I, 72, 39-40; R.I, 258, 266-268; R.II, 378, R.III, 806-807; R.II, 654-656).

August 8, 1945: The A.F.L., C.I.O., and the Petitioner meet to discuss a petition for change of representatives filed with the N.L.R.B. on August 3, 1945 (R.II, 549-552).

Petitioner's Vice President agreed that, by this date, it was apparent that a campaign for change of representatives was in progress (R.I, 72; R.II, 547).

August 11, 1945: Employee Zulaica reports to foreman, that C.I.O. official warned him active advocacy of A.F.L. would lead to dismissal and that the C.I.O. would not have to have the majority discharged but "can pick some of you out and claim that you were the leaders, and that will scare the rest of them". Employee requests foreman to talk to the Superintendent (R.I, 41; R.II, 305-310).

Employee Zulaica informed in afternoon by Assistant Superintendent "I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union". (R.I, 73; R.II, 310-312).

August 17, 1945: The five stewards and four committeemen request and are denied reinstatement. (R.I, 73; R.I, 266-267, 289-290; R.II, 341-342, 380-381, 427; R.III, 679-680, 699-700).

August 30, 1945: C.I.O. official demands Petitioner discharge about 70 employees (R.I, 73-74; R.III, 728-731). Petitioner's Labor Relations Director replies "• • • this thing has gone too far. You are getting too many people involved here • • •" and refuses to comply. (R.I, 74; R.III, 730).

August 31, 1945: C.I.O. requests the discharge of six employees and the Petitioner complied with the request. (R.I, 46; R.III, 806-807, R.II, 654-656). All of these employees had joined the A.F.L., worn A.F.L. buttons in the plant and had taken an active role in the A.F.L. organization. (R.II, 656-657, 506-507). The discharges were effected pursuant to a check of the union dues books of all employees (R.I, 46; R.III, 681, 682, 709-716), but it was stipulated that the C.I.O. did not request their discharge on the ground of nonpayment of dues. (R.II, 518).

September 1, 1945: C.I.O. requests and obtains the discharge of eighteen employees. (R.I, 74, 46-47; R.III, 806-807; R.II, 654-656). Petitioner assembled the discharged employees and the employees were informed by Petitioner's Labor Relations Director "If you had kept this quiet about the A.F.L. this wouldn't have happened to you" (R.I, 316), and that "If we (discharged employees) didn't wear A.F.L. buttons and didn't talk too much, why, we wouldn't get in

this trouble in the first place" (R.II, 577) and that "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess". (R.II, 488-489).

September 5, 1945: One more employee, active on behalf of the A.F.L., is discharged pursuant to a request by the C.I.O. (R.I, 51-52; R.II, 631-635).

September 7, 1945: Two more employees, active on behalf of the A.F.L., are discharged pursuant to a request by the C.I.O. (R.I, 50; R.III, 806-807; R.II, 654-656).

September 11, 1945: One employee, working as a machinist under A.F.L. jurisdiction, active on behalf of the A.F.L., is discharged. This particular employee was notified by the Labor Relations Director that he, alone, was required to join the C.I.O. He applied for transfer to the C.I.O. but was refused admission. Other machinists were allowed to continue work without joining the C.I.O. (R.I, 50 and n. 20, 52; R.II, 641-642, 645-646; R.III, 806-807).

In addition to the events of the above particularized dates which cumulatively demonstrate a calculated campaign to eliminate the leadership of a rival organization in advance of an election, the record is replete with indications and direct evidence that the campaign in the plant during the above period was characterized by considerable intensity and bitterness. (R.I, 72, 41; R.I, 299-301, 305-314; R.II, 387-388, 391-394, 411-414, 433-436, 475-478, 481-488, 580, 583-584, 592-594, 631-632). The C.I.O. pointedly reminded the employees by bulletins and oral threats that allegiance to the A.F.L. was tantamount to a tacit request

for discharge. (R.I, 72, 77, 43-44; R.I, 299-300, 305-314; R.II, 438-439, 475, 481-488, 516, 564, 580-581, 592-594, 608-609, 631-632, R.III, 785, 789-790). During this period Superintendent Altman and the Labor Relations Director were making daily tours of the plant. (R.I, 180-182, R.III, 696-697, 757-758). During the course of the campaign, the Labor Relations Director received the union papers. (R. III, 759-760). It was the practice of the Superintendent (R.III, 686-687) and the Labor Relations Director (R.III, 759) to scrutinize the bulletin boards.

On January 13, 1949, the Court of Appeals affirmed the decision of the Board (R.IV, 990-992) and its findings: (a) that the C.I.O. sought to use the closed-shop contract for the purpose of punishing the insurgents, and (b) that Colgate acceded to its discharge-demands notwithstanding Colgate knew that the union had suspended the men in reprisal for their activities in favor of the rival union. The Court succinctly stated, "The evidence abundantly supports these findings".

STATEMENT OF THE ISSUE.

The order of the Court allowing certiorari is "limited to the question of the construction of Section 8(3) of the National Labor Relations Act of 1935 in relation to this case".

SUMMARY OF ARGUMENT.

The decision and order affirmed by the Court of Appeals correctly recognizes that the *Rutland Court Doctrine* is a proper construction of the proviso to Section 8(3) of the Act. The decision and order recognizes that the *Rutland Court Doctrine* is supported by:

(1) The language, policies, and legislative history of the Act;

(2) Interpretation of the collective bargaining agreement, itself, and recognition of the limitations inherent in a closed shop contract executed within the framework of the Act;

(3) Implicit validation of the doctrine in the decision of this Court in *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248.

The decision of the Court of Appeals correctly construes the National Labor Relations Act and is in harmony with the applicable decisions of this Court.

ARGUMENT.

The fundamental question presented for decision in this instant case is whether the *Rutland Court Doctrine* correctly construes the proviso to Section 8(3) of the National Labor Relations Act of 1935 as not permitting the discharge of, or refusal to rehire, an employee, at the request of the contracting union, when, *to the employer's knowledge*, the contracting union requested the discharge, or counseled the refusal to rehire, because the

employee had engaged in rival union activities during a period when it was appropriate for employees to seek a change of bargaining representatives.

I.

THE RUTLAND COURT DOCTRINE IS A LOGICAL CONSEQUENT OF THE PURPOSE AND LANGUAGE OF THE ACT.

Whatever may have been the ultimate objectives in the enactment of the National Labor Relations Act, all are agreed that the Act was designed to attain its objectives through a formulation of policy in favor of self-organization and the creation of the right of self-organization of employees. Recognition of this dominant theme is the fundamental guide to the construction of the provisions implementing this underlying right. As stated by the Board in *Matter of Rutland Court Owners*, 44 N.L.R.B. 587 and pp. 593-594:

> "The fundamental policy of the Act, in the light of which all its provisions * * * including the proviso to Section 8(3) must be read, is to 'promote industrial peace', thereby fostering commerce, through the protection of self-organization and the encouragement of collective bargaining by representatives of the employees' own choosing. The employees' right to select representatives to be meaningful must necessarily include the right at some appropriate time to change representatives * * * Effectuation of the basic policies of the Act requires, as the life of the collective contract draws to a close, that the employees be able to advocate a change in their affiliation without fear of discharge for so doing."

And, as one commentator admirably stated, in discussing the nature and purpose of the Act:

> "Self-determination of workers and industrial democracy is its objective. The theme is first intimated in the Findings and Policy of the Act. It is announced in its full force and various phases in Section 7, where the employees are declared to have the 'right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.' The various phases of worker's autonomy are reinforced and protected by the naming of various unfair labor practices. Likewise, the act provides in Section 9 for election machinery to ascertain the free choice of representatives. All contribute to the articulateness of the central idea—self-government for the workers * * *"
>
> Rosenfarb, *The National Labor Policy and How it Works*, Harper & Bros., 1940, pp. 249-250.

See also:

Teller, *Labor Disputes and Collective Bargaining*, Vol. II, Section 243, Baker, Voorhis & Co., 1940, pp. 687-688;

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

It is surprising, therefore, that Petitioner should wrest, from the proviso to Section 8(3), an intention to create a medium for the frustration and nullification of the fundamental right of self-organization conferred by Section 7 and protected by the provisions of Section 8(1), 9 and 10 of the Act. Indeed, Petitioner contends that Con-

gress determined to permit the coercive use of closed shop contract in perpetuity to frustrate any shift of representatives! (Petitioner's Brief p. 48.)

Petitioner reaches this startling conclusion through certain equivocal language in the legislative history indicating an intention of Congress not to interfere with state law invalidating or validating a closed shop contract. (Petitioner's Brief pp. 48-56.) Careful analysis of the language therein set forth indicates it was the intent of Congress to permit, if sanctioned by state law, the discharge of employees for non-membership in a union. One will look in vain for any indication that Congress intended to permit discharge of employees for non-membership in a union *and* the coordinate denial, on arbitrary grounds, of membership.[1]

Petitioner has also contended that Congress deliberately omitted any consideration of the problem of rival union competition for representation when the Act was drafted because "the schism in the labor movement which culminated in open warfare between the A.F.L. and C.I.O. had not occurred". From the fact that the Act antedated the C.I.O.-A.F.L. schism, Petitioner leaps to the conclusion that Congress did not foresee and anticipate the coercion of employees by labor organizations in representation proceedings. This, of course, is contrary to the fact:

---

[1] "If the NLRA means . . . that a majority union may lawfully exercise congressionally granted powers so as to combine the closed shop with the closed union, Congress has by implication entered into a domain of policy-making which is very much the Supreme Court's affair, since it raises a substantial issue of due process." Note, 50 Harv. L. Rev. p. 454 (1945).

"Intra-Federation jurisdictional disputes have always plagued the A. F. of L. Large national unions, independent of the A. F. of L., did exist at the time of the enactment of the act. The I.W.W. movement in American labor is not an item in ancient history. And to be accurate, if not tactful, one must be reminded that the A. F. of L. itself saw the light of day in an era of labor schism and, in fact, constituted one branch of dual unionism, the other being the older Knights of Labor. As Senator Walsh of Massachusetts declared:

> 'If the American Federation of Labor or any other union is not honestly and sincerely and devotedly interested in the welfare of its members, we must recognize the fact that sooner or later the employees belonging to it will, in some election, move out of the American Federation of Labor and into an international union or other union of some kind, a different union of their own'. (Cong. Rec., May 16, 1935, p. 7959)."

Rosenfarb, *The National Labor Policy and How it Works*, Harper & Bros. 1940, p. 284.

Recapitulating, it is apparent that the underlying principle of construction to be applied is that any component provision of the Act must accord with the principle of self-organization. That Congress intended to permit a closed shop agreement to be executed by an arbitrarily closed union was never intimated in the legislative history. Indeed, it is manifest that Congress enacted the provisions of Sections 7, 8, 9 and 10 anticipating rivalry between powerful independent unions. The *Rutland Court Doctrine*, therefore, is consonant with the legislative history, purpose and language of the Act.

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II.

THE PROVISO TO SECTION 8(3) WAS DESIGNED TO DISCLAIM A NATIONAL POLICY HOSTILE TO THE CLOSED SHOP CONTRACT AND NOT TO CREATE A MEDIUM FOR THE NULLIFICATION OF THE PRIVILEGES CONFERRED BY SECTION 7 OF THE ACT.

The conflict envisaged by the Petitioner between the proviso of Section 8(3) and the fundamental rights set forth in Section 7 of the Act is more apparent than real. Indeed, petitioner has sought to convert an expression of neutrality on the subject of closed shop contracts into a Frankenstein designed to obstruct and frustrate the representation provisions of the Act. In asserting this position, Petitioner misconstrues the proviso to Section 8(3).

As ably stated by one commentator:

> "• • • It must be borne in mind that the statutes never expressly validate the making of an agreement with a statutory representative whereby employment is conditioned on the worker's membership in that union; they simply provide that nothing in them shall invalidate the making of such an agreement which would otherwise be valid. The difference is crucial here. Blanket condemnation of such agreements as unfair labor practices is withheld; but blanket approbation is not given. If such a contract • • • though not objectionable for its discrimination • • • is used as a means to obstruct the representation provisions of the law, its legality may be questioned. In other words, nothing in the Act • • • may render illegal the making of the agreement or its normal performance, but its performance will become abnormal and illegal when used as a means of evading other provisions of the law. It is on this basis that the Na-

tional Labor Relations Board (decided Matter of Rutland Court Owners). Freedom to make a closed-shop contract does not include freedom to use that contract in such a way as to block, perhaps forever, the Board's performance of its duty to determine what union the majority wants."

Bertram Wilcox, "The Triboro Case—Mountain or Molehill", 56 *Harvard Law Rev.* 576 at pp. 594-595 (1943).

Consonant with the above analysis of the proviso to Section 8(3), the Board, in *Matter of Rutland Court Owners*, supra, at p. 594, refused to read into the proviso an intention to nullify the provisions of the Act for the determination of questions of representation:

"The legislative history shows that the proviso was merely inserted to avoid the interpretation of the Act which some had given to Section 7(a) of the National Industrial Recovery Act that closed-shop contracts were outlawed under all circumstances. Accordingly, the proviso is so worded as to protect the 'making' of closed-shop contracts if certain conditions are satisfied. By reasonable inference, the Board has held, the proviso also protects the performance of such contracts. But the mere fact that all closed shops are not unlawful, by virtue of the proviso, is no reason for holding that closed shops may be made perpetual because validly initiated pursuant to the proviso. Thus, for example, in the *Ansley Radio* case the Board confined its decision, that discharges made under a validly executed closed-shop contract did not constitute unfair labor practices, to cases where the agreement was 'for a reasonable period of time' or 'for a reasonable duration'."

The Board's interpretation of the primary legislative purpose of the proviso to Section 8(3) has since found express approval by this Court in *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 at p. 306 (1949):

> "* * * Section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of words 'nothing in this Act * * * or in any other statute of the United States', and it is confirmed by the legislative history."

And, as stated by the Ninth Circuit in *Local No. 2880 v. N.L.R.B.*, 158 Fed. (2d) 365, at p. 386:

> "The Board's construction of the proviso of Subsection 8(3) with relation to Section 7 * * * as not warranting discharge for activities at an election for such choice is so obviously rational that we well could be required to accept it under the rule that upon 'questions of law the experienced judgment of the Board is entitled to great weight'. *Medo Corporation v. National Labor Relations Board*, 321 U.S. 678, 681 * * * we are of the opinion that it is the only interpretation to be given the proviso * * *"

III.

THE RUTLAND COURT DOCTRINE IS SUPPORTABLE ON ORDINARY CONTRACT AND AGENCY PRINCIPLES.

By Section 7 of the Act, the employees are granted the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other

mutual aid or protection". It is manifest that the right to bargain collectively is a right granted to the employees and not to the representatives. The representatives, deriving their power from the employees, have a necessarily implied duty to represent the employees fairly and impartially. Counsel submits that the statutory power of a representative to make a closed shop contract necessarily implies the correlative duty to refrain from exercising the statutory power of exclusive representation to arbitrarily discriminate against employees who are not eligible to retain membership because they have exercised rights conferred by a federal statute.

Tacit recognition of this principle was announced by this Court in *Steele v. Louisville & National Railroad*, 65 Sup. Ct. 226 (1944) at p. 230. Chief Justice Stone, speaking for a majority, and faced with the arbitrary exercise of bargaining authority derived from the Railway Labor Act, stated:

> "* * * the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights * * *"

And, further, at p. 231:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, in-

deed, their right to earn a livelihood by pursuing the occupation in which they are employed."

Speaking of the employer's obligations, the Court significantly stated, at p. 232:

"No more is the Railroad bound by or *entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making.*" (Emphasis added.)

The arbitrary and discriminatory act of the representative in the *Steele* case resulted from refusal to equally represent Negro employees. In the instant case the arbitrary act of the representatives is in excluding employees from the union, without hearing or notice, because of their exercise of rights guaranteed by a federal statute, *and* the concurrent exclusion from employment. That the union has the right to determine eligibility of its membership is not denied. Counsel for this intervenor submits, however, that it is denied that this right may be arbitrarily exercised and coupled with a closed shop proviso to preclude members from exercising rights guaranteed them by the Act.

As stated by Professor E. Merrick Dodd in commenting upon the *Rutland Court Doctrine:*

"No doubt an employee may conduct himself in such a manner as to justify a union, despite the fact that it is his statutory bargaining representative, in insisting on his exclusion from employment as well as from union membership. But his prior affiliation with another somewhat antagonistic union ought not to be regarded as a sufficient justification for using a statutory power to represent him as a means of depriving

him of his job. The statutory right to make a closed shop contract may properly be read as subject to the limitation that such a contract cannot be availed of for that purpose."

Note:

58 *Harvard L. Rev.*, p. 454 (1945).

It is clear, likewise, that the decision in *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, equally rested upon the principle enunciated in the *Steele v. Louisville & National Railroad* case that a bargaining representative deriving his exclusive power to represent from a federal statute may not arbitrarily exercise that power to discriminate against the employees he presumably represents. As stated in *Hunt v. Crumboch*, 325 U.S. 821 (1945), in which the Court cited the *Steele* and *Wallace* cases:

"Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent."

Nor is this a novel principle. Courts have been quick to strike at efforts by unions to curb the civil rights of union members. Thus, Courts have nullified union limitations on the right to vote according to conscience. (*Schneider v. Local No. 60*, 116 La. 270, 40 So. 700 (1905).) And have precluded limitations on the right to petition the legislature. (*Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 Atl. 70 (1921).) And have been equally zealous in removing limitations on the right of recourse to the judicial tribunals of the land. (*Austin v. Searing*, 16 N.Y. 112 (1857).)

If this counsel is correct in asserting that an implied constitutional limitation is imposed upon the bargaining

representative to preclude the arbitrary exercise of the power to represent, it is obvious that on ordinary contract and agency principles the employer and Petitioner in the instant case cannot rely upon the request for discharge as a defense to his discouragement of self-organization.

On familiar agency principles, the employer, having reason to believe that the agent was acting against the interest of his principles, would proceed with enforcement of the contract at his peril.

On ordinary contract principles, the employer, having knowledge that the agent was attempting to deprive the employees of rights guaranteed them by the Act, would not be entitled to enforce the contract.

See:

Rest., Contracts, sec. 602(2).

IV.

APPROVAL OF THE RUTLAND COURT DOCTRINE IS IMPLICIT IN THE DECISION OF THIS COURT IN WALLACE CORPORATION v. NLRB.

In *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, this Court expressly affirmed the power of the Board to denominate as an unfair labor practice the discharge of certain employees pursuant to a closed shop contract when the employer had knowledge that the incumbent union's requests for discharge were based on the employees' advocacy of a rival union during prior representation proceedings. In language directly applicable to the instant proceeding, Justice Black, speaking for the majority, stated:

> "We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much of a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone."

Indeed, in the instant case there is strong evidence to indicate that the company effected the discharges at a time when the incumbent union was facing the likelihood of repudiation at the polls.[2] If it is wrong for a company to assist a union, triumphant at the polls, in ridding itself of dissidents, *a fortiori* it is wrong, in a pre-election campaign, to assist the incumbent in the ruthless elimination of a mass of employees who, in the exercise of their privilege of freedom of association, are honestly seeking, at a proper time, a change of representatives. To hold otherwise would be tantamount to a denial of any privilege of employees, at any time, to challenge effectively the majority status of the incumbent union.

Petitioner has urged that this Court's decision in the *Wallace* case applies "solely to the unfair labor practices of an employer committed through the medium of a dominated or company union".[3]

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[2]After the discharge of five plant stewards active in organization against the incumbent union *a majority of the employees* left the plant in protest (R.I, 71, 38; R.I, 257).

[3]Petition of Colgate-Palmolive-Peet Co., pages 25-26, 49-52.

This conclusion is reached by stressing the words "medium or a 'union of its own creation'" appearing in a paragraph of the decision clearly designed to indicate that the company could not accomplish by indirection that which it could not do directly.

The contention completely overlooks the fact that the Board had adopted the principle of refusing to inquire into charges of company domination after a settlement, unless there had been a subsequent unfair labor practice. The Board found there had been a subsequent unfair labor practice in the discharge of the C.I.O. adherents.

As stated by one commentator:

> "Despite the uncertainty as to the scope of the decision brought about by the use of the words 'union of its own creation' it is probably safe to assume that the learned Justice and those who concurred in his opinion would sustain the Board's view that it made no difference whether the union at whose behest the employer acted was or was not company-dominated or assisted."
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> E. Merrick Dodd, "The Supreme Court and Organized Labor, 1941-1945", 48 *Harvard Law Review*, 1018 at p. 1039 (1945).

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November 9, 1949.

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